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No. 80-149

In the Supreme Court of the United States

OCTOBER TERM, 1979

MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL 610, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

THE PULITZER PUBLISHING COMPANY

AND

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Respondent Pulitzer Publishing Company publishes the St. Louis Post-Dispatch. Berberich Delivery Company delivers the Post-Dispatch pursuant to a "cost-plus" contract with Pulitzer. Petitioner represents the truck drivers who deliver the newspaper to vendors. The Board found that Pulitzer and Berberich were joint employers of the drivers and therefore that Pulitzer violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29

U.S.C. 158(a)(5) and (1), by refusing petitioner's request that it participate in collective bargaining together with Berberich concerning any actual or contemplated changes in the drivers' wages, hours, or terms and conditions of employment. The Board stated (Pet. App. A-22):

> [I]n finding that [Pulitzer] is a joint employer with Berberich, we rely on the totality of evidence and note significantly [Pulitzer's] demonstrated authority to determine labor relations policies and terms and conditions of employment for Berberich's drivers.

The Board ordered Pulitzer to bargain with petitioner on behalf of the drivers (*id.* at A-15 to A-16, A-22).

The court of appeals denied enforcement of the Board's order (Pet. App. A-26 to A-36). It held that "substantial evidence on the record as a whole does not support the conclusion that the companies were joint employers of the Berberich drivers assigned to the delivery of the Post Dispatch" (*id.* at A-32). The court explained (*id.* at A-36):

> The totality of the relevant evidence in this case does not support the conclusion that Pulitzer and Berberich are joint employers. There is no common ownership or management between the companies. Their operations are not substantially interrelated beyond the extent necessary to the performance of the basic contractual duty of Berberich to deliver the newspapers. The evidence is insufficient to show centralized control of labor relations. The degree to which Pulitzer exercises control of the labor policies and terms and conditions of employment of Berberich's drivers is not substantial.

2. While the Board believes that the court of appeals erred in rejecting the Board's finding that Pulitzer and Berberich were joint employers, it did not file its own

petition for certiorari because it views the disagreement between the Board and the court as presenting only an evidentiary issue, which this Court would not ordinarily review.[1] See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). However, should the petition be granted, the Board will defend its decision and order.

Respectfully submitted.

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[1]While petitioner complains that the court of appeals erroneously found the joint employer question to be one of law rather than of fact, it does not contend that the court applied the wrong standard. In fact, while the court faulted the Board for not "clearly articulat[ing] the [applicable] standard" (Pet. App. A-31), both the Board and the court looked to the totality of the circumstances to determine the joint employer issue, and the court concluded that substantial evidence did not support the Board's findings.

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